ABDUL MALEK HASSAN *a*

v.

MOHAMMAD HIHWAN MASTUKI & ANOR.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
SYED AGIL SCJ
[CIVIL APPEAL NO. 413 OF 1985]
25 OCTOBER 1986 *b*

TORT: *Accident - Deceased killed - Action by appellant in High Court for damages against respondents - Civil Law Act 1956 - Sections 7, 8 - Learned Judge made no award for loss of future earnings during "lost years" - Leave given to appeal against this part of his judgment - "lost years" - Whether there should be an award for loss of future income.* *c*

The deceased, Ahmad Fadzil bin Abdul Malek, was killed in a motor accident and his father, the appellant (plaintiff in the High Court) brought an action for damages against the respondents (defendants in the Court below) under the provisions of ss. 7 and 8 of the Civil Law Act 1956. At the time of his death the deceased was 17½ years old and was not in gainful employment. He was a student in Form 5. The learned Judge made no award for loss of future earnings during the "lost years" (the number of years of a person's life which had been shortened as a result of the accident) and leave was given to appeal against this part of his judgment. *d*

Held: *e*

[1] The deceased in the instant case was still at school when he was killed. There was no knowing how long his father intended to keep him there after Form 5. He might or might not have been selected for Form 6 classes. His general education and upkeep would have been a substantial burden to the father for several more years if he had lived. In other words, the deceased had not even started to apply for a job or to look for employment. His future was fraught with uncertainties - uncertainties not only as to how long the father would continue to keep him in school but also as to when in the future he would start to earn a living. *f*

[2] Unless the plaintiff can adduce evidence to satisfy the trial Court that at the date of his death the deceased was about to complete his apprenticeship or probation period, there is no material on which an assessment can properly be made. In such circumstances, the Judge should refrain from entering into speculation or guesswork in assessing the deceased's estimated loss of future earnings in respect of the "lost years". *g*

[3] On the facts of this case, their Lordships agreed with the learned Judge that there should be no award for loss of future income in respect of the "lost years" on the ground that the plaintiff had failed to prove that the deceased, at the time of his death, had any real prospects of earning such an income. In this case, the deceased did not appear to even make a start or attempt to look for a job. *h*

[Appeal dismissed with costs to respondents.]

Cases referred to:
Harris v. Bright's Asphalt Contractors Ltd. [1953] 1 All ER 395
Pope v. D. Murphy & Son [1960] 2 All ER 873
Oliver v. Ashman [1961] 3 All ER 323 *i*

Skelton v. Collins [1966] 115 CLR 94
Pickett v. British Rails Engineering Ltd. [1980] AC 136
Gammell v. Wilson and Furness v. B. & S. Massey [1982] AC 27
Yap Ami & Anor v. Tan Hui Pang [1982] CLJ (Rep) 367
Taff Vale Railway Co. v. Jenkins [1913] AC 1

Legislation referred to:
Civil Law Act 1956, ss. 7, 8(2)(c)
Fatal Accidents Acts 1846-1908, [UK]s. 7
Law Reform (Miscellaneous Provisions) Act 1934 [UK], ss. 1(2)(c), 8

For the appellant - Khoo Eng Chin; M/s. Khoo & Sidhu
For the respondents - R.K. Nathan; M/s. R.K. Nathan & Co.

JUDGMENT

George Seah SCJ:

The deceased, Ahmad Fadzil bin Abdul Malek, was killed in a motor accident and his father, the appellant (plaintiff in the Court below) brought an action for damages against the respondents (defendants in the Court below) under the provisions of ss. 7 and 8 of the Civil Law Act 1956. It is common ground that s. 7 is based substantially on Fatal Accidents Acts 1846-1908 and s. 8 is modelled along the Law Reform (Miscellaneous Provisions) Act 1934. At the time of his death the deceased was 17½ years old and was not in gainful employment. He was a student in Form 5. The learned Judge made no award for loss of future earnings during the "lost years" (the number of years of a person's life which had been shortened as a result of the accident) and leave was given to appeal against this part of his judgment.

In *Harris v. Bright's Asphalt Contractors Ltd.* [1953] 1 All ER 395 Slade J held that no damages can be recovered in respect of lost earnings for the period between the date of his probable death and the age to which he was likely to have lived if he had not had the accident. Streatfield J in *Pope v. D. Murphy & Son* [1960] 2 All ER 873 held that the injured plaintiff was entitled to be compensated for what he had in fact lost through the defendants' negligence, and therefore, the period to be considered in assessing damages for loss of earning capacity was the period during which, apart from the accident, he might reasonably have expected to work, not the period of life left to him as a result of the accident. In *Oliver v. Ashman* [1961] 3 All ER 323 the Court of Appeal overruled *Pope* case and approved *Harris* case. The Court held that no claim for loss of earnings can be made in respect of the period the plaintiff could have expected to live, had his life expectation not been shortened by the accident giving rise to his claim. He cannot recover in respect of the earnings he could have expected during the "lost years". *Oliver v. Ashman* (*supra*) was not followed by the High Court of Australia in *Skelton v. Collins* [1966] 115 CLR 94 and was eventually overruled by the House of Lords in *Pickett v. British Rails Engineering Ltd.* [1980] AC 136 where it held that a **living** plaintiff could recover damages for loss of income for the "lost years" and only Lord Russell dissented.

Two years later, the issue for the House of Lords in *Gammell v. Wilson and Furness v. B. & S. Massey* [1982] AC 27 was whether a claim for damages for loss of earnings during the "lost years" could be brought by the victim's estate under the Law Reform (Miscellaneous Provisions) Act 1934 in a case where the victim had died before he had recovered judgment in Court. The facts of the 2 cases were broadly similar: both involved claims by parents representing the estates of deceased children, a 15-year old boy killed in a road accident in

Gammell case and a 22-years old unmarried man killed at work in Furness. In both cases substantial awards for loss of earnings during the "lost years" had been made to the estate. The House of Lords including Lord Russell unanimously upheld these awards holding, *inter alia*, that after the decision in *Pickett* case, the outcome in the present appeals were very probably inevitable.

The decision of the Houses of Lords in *Gammell* case was based on the construction of s. 1(2)(c) of the Law Reform (Miscellaneous Provisions) Act 1934 and it is not in dispute that s. 1(2)(c) is similar in all material respects to our s. 8(2)(c) of the Civil Law Act 1956. Although a decision of the House of Lords is not binding on us but the House of Lords was discussing a section of the Law Reform (Miscellaneous Provisions) Act 1934 which is identical to s. 8(2)(c) of the Civil Law Act 1956. In these circumstances *Gammell* case is highly persuasive and should be followed unless it is unacceptable in principle. In fact, the interpretation in *Gammell* case was adopted by the former Federal Court in *Yap Ami & Anor. v. Tan Hui Pang* [1982] CLJ (Rep) 367.

Before embarking on any assessment of loss of earnings in respect of the "lost years" we think the following observation of Lord Wilberforce and Lord Diplock ought to be noted. In *Pickett* case at p. 150 Lord Wilberforce said:

> My Lords, in the case of the adult wage earner with or without dependents who sues for damages during his lifetime, I am convinced that a rule which enables the "lost years" to be taken account of comes closer to the ordinary man's expectation that one which limits his interest to his shortened span of life. The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in a market, has a value which can be assessed. A man who receives that assessed value would surely consider himself and be considered compensated - a man denied it would not. And I do not think that to act in this way creates insoluble problems of assessment in other cases. In that of a young child (see *Benham v. Gambling* [1941] AC 157 (2½ years old)), neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (see *Skelton v. Collins* [1966] 115 CLR 94 (17 years old)) the value of "lost" earnings might be real but would probably be assessable as small.

In *Gammell* case at p. 65 Lord Diplock said:

> My Lords, if the only victims of fatal accidents were middle-aged married men in steady employment living their lives according to a well-settled pattern that would have been unlikely to change if they had lived on uninjured, the assessment of damages for loss of earnings during the "lost years" may not involve what can only be matters of purest speculation. But as the instant appeals demonstrate and so do other unreported cases which have been drawn to the attention of this House, in case where there is no such settled pattern - and this must be so in a high proportion of cases of fatal injuries - the Judge is faced with a task that is so purely one of guesswork that it is not susceptible of solution by the judicial process. Guesses by different Judges are likely to differ widely - yet no-one can say that one is right and another wrong.

Now in *Gammell* case the deceased was just over 15 years old when he was killed in a motor accident. His father, suing as administrator of the deceased's estate issued a writ claiming damages under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934. Judgment for the sum of £2000 was given under the 1976 Act and £9590 under the 1934 Act. The £9590 was made up of (a) £6656 for damages for loss of income, (b) £1184 as special damages and (c) £1750 for loss of expectation of life.

Furness was 22 year old, active and healthy, in steady employment living at home and unmarried when he was killed at work. In a claim for damages the Judge awarded total damages under the 1934 Act at £19,106 including £17,275 for loss of future earnings but having found some contributory negligence by the deceased, he awarded 90 percent of that amount.

Furness case is clearly distinguishable from the present case in that there the deceased was in gainful employment and was receiving a steady income at the time of his death.

In *Gammell* case we think the headnote seems rather misleading. It gives the impression that the deceased was not earning any wage at his death. This is what Lord Scarman had to say about this deceased at p. 79:

> The boy was 15. His father is of the Romany blood, uneducated and illiterate. His mother is a well-educated woman who, as a witness, impressed the Judge. She knew her boy and was confident he would make his way in the world. He never went to school, but his mother taught him his three "Rs". At 14 (the year before he died) he began work. When he died, he was earning £20 a week from the sort of work he, with his Romany background, was well placed to find (fruit picking, scrap dealing and road surfacing). He was saving up for a van in order to follow the career of an antique dealer (in the footsteps of an uncle). When he died, his future was not merely matter for speculation: he had made a start, was in work, and had won the confidence of his sensible mother, who had herself educated him.

In short, at the time of his death, the deceased in *Gammell* case albeit only 15 years of age, was actually earning £20 per week and that he had commenced to earn his living at the young age of 14. Similarly, in *Skelton* case the plaintiff was 17 years old when the accident happened and he was earning approximately £13 a week. At the trial when he would be about 21 years of age, he would probably have earned something in excess of £20 a week.

Here the deceased was still at school when he was killed. We do not know for how long his father intended to keep him there after Form 5. He might or might not be selected for Form 6 classes. His general education and upkeep would have been a substantial burden to the father for several more years if he had lived. In other words, the deceased in this instant case had not even started to apply for a job or to look for employment. His future was fraught with uncertainties - uncertainties not only as to how long the father would continue to keep him in school but also as to when in the future he would start to earn his living.

We do do not think that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of his death provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life (see *Taff Vale Railway Co. v. Jenkins* [1913] AC 1). In that case, the father brought an action for damages for the loss of his daughter aged 16, under the Fatal Accidents Act 1846. It was proved that at the date of her death, the deceased, who was living with her parents, was nearing the completion of her apprenticeship as a dressmaker and was likely in the near future to earn a remuneration which might quickly have become substantial. In our opinion, the same principle could in justice be extended to a claim under s. 8(2)(c) of the Civil Law Act 1956. In *Gammell* case at p. 78 Lord Scarman said that if the plaintiff could establish a "real prospects" of employment an assessment would be made. His Lordship however, cautioned against making assessment based on fanciful speculation without any basis of fact. For example, in the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is a mere speculation. No estimate being possible, no award - not even a "conventional" award - should ordinarily be made. Support for this view may be found in a passage in the judgment of Lord Wilberforce in *Pickett* case at p. 150 where his Lordship said:

In that of a young child (see *Benham v. Gambling* [1941] AC 147 (2½ years)) neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (see *Skelton v. Collins* [1966] 115 CLR (17 years)) the value of "lost" earnings might be real but would probably be assessable as small.

There is no need for us to deal with all the many cases of this subject which have been referred to by learned Counsel for both the appellant and the respondents in this appeal and which have been carefully, and in our opinion, correctly, analysed in the judgment of Peh Swee Chin J. Unless the plaintiff can adduce evidence to satisfy the trial Court that at the date of his death the deceased was about to complete his apprenticeship or probation period, there is no material on which an assessment can properly be made. In such circumstances, the Judge should refrain from entering into speculation or guesswork in assessing the deceased's estimated loss of future earnings in respect of the "lost years". As Lord Scarman rightly pointed out in *Gammell* case at p. 79 "The Judge must make the best estimate based on the known facts and his prospects at the time of death". This test seems to be supported by *Taff Vale* case, and we would adopt it in construing the provisions of s. 8(2)(c) of the Civil Law Act 1956. It follows that on the facts of this case, we agree with the learned Judge that there should be no award for loss of future income in respect of the "lost years" on the ground that the plaintiff had failed to prove that the deceased, at the time of his death, had any real prospects of earning such an income. In this case, the deceased did not appear to even make a start or attempt to look for a job.

For the above reasons we dismiss the appeal with costs to the respondents. The deposit to be paid to the respondents on account of taxed costs.

Also found at [1987] 1 CLJ 22